Supreme Court, U.S.
FILED
MAY 5 2003
CLERK

No. 02-1221

IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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May 5, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR THE PETITIONER

The petition for certiorari demonstrated that the Federal Circuit's holding that the government need not refund *with interest* the more than $1.4 billion it unconstitutionally exacted from exporters is unfaithful to the letter and the spirit of this Court's prior decision in this case, *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998); Pet. App. 102a-110a (*U.S. Shoe I*), as well as to the statutory provisions enacted by Congress to implement the Harbor Maintenance Tax (HMT). Congress has long provided that those forced to pay taxes (28 U.S.C. 2411) or customs duties (19 U.S.C. 1505) in excess of their lawful obligations must be reimbursed with interest. The HMT, although denominated a "tax," relates to the passage of goods through the ports, prompting Congress to subject it to the administrative structure governing customs duties in Title 19. Although the customs laws are stated with import duties in mind, "that is hardly surprising in view of the Export Clause, which confines customs duties to imports." *U.S. Shoe I*, Pet. App. 106a. The government now joins the Federal Circuit in seizing on verbal anomalies that result from Congress's determination to apply to the HMT the customs provision providing for "[r]efund of duties * * * and interest" (19 U.S.C. 1505(b) (title)). This Court rejected the identical contention in *U.S. Shoe I* on the basis of Congress's explicit instruction to treat the HMT "as if [it] were a customs duty" (Pet. App. 106a (quoting 26 U.S.C. 4462(f)), and should do so again in this case.

Quite apart from Congress's evident intention that the United States not profit from the fruits of unlawful or excessive taxes and customs duties, the Export, Takings, and Due Process Clauses forbid the government's retention of the substantial profits it actually earned here. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980); *Fairbank* v. *United States*, 181 U.S. 283 (1901). The no-interest rule (see *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986)) is inapposite when the issue is the return of "income [that] has been actually received by the Treasury and is in its possession" (*Henkels* v. *Sutherland*, 271 U.S. 298 (1926)), at the very least when the government

obtains money through an exaction that is void *ab initio* and furthermore holds that income in a distinct fund such as the Harbor Maintenance Trust Fund (cf. *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring)). Characterizing the HMT as not excessive relative to the benefits conferred on exporters, the government and the court below conclude that interest is not owing because, under *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), a reasonable user fee is not a taking. The argument takes one's breath away. The HMT is not an excessive user fee because *it is not a user fee at all* but rather is void as an *unconstitutional tax on exports*. So this Court squarely held in *U.S. Shoe I*. This persistent unwillingness to give a full measure of effect to this Court's prior decision in this case alone merits review and reversal.

For these reasons, as well as those further detailed in the briefs *amici curiae*, certiorari should be granted.

I. The Solicitor General disputes neither that the questions presented are central to the administration of the customs laws nor that this Court's practice (exemplified by *U.S. Shoe I*) is to review "Federal Circuit decisions of significant fiscal importance." Pet. 12 (quoting Pet. for Cert. of the U.S., *U.S. Shoe I* 25). See *Amicus* Br. of HMT Steering Committee 14-18. The "[n]umerous cases" that this Court recognized were pending at the time of *U.S. Shoe I* (Pet. App. 105a) have since exploded to more than 10,000 administrative and judicial claims for more than $700 million in interest owing on refunds of the HMT. All of those claims are controlled by this single test case, as reflected by the several follow-on petitions, each of which seeks to be held pending the Court's disposition of this case. See No. 02-__, *IBM* v. *United States*; No. 02-1512, *Arbon Steel & Serv. Co.* v. *United States*; No. 02-1286, *Hohenberg Bros. Co.* v. *United States*.

II. The Solicitor General, like the Federal Circuit, is unable to articulate any *reason* Congress would have intended to deny exporters interest on an unconstitutional tax. The U.S. Code contains a raft of provisions governing refunds of both taxes and customs duties, under which "interest was affirmatively and separately contemplated by Congress." *Library of Congress* v.

Shaw, 478 U.S. 310, 315 (1986). See Pet. 13 (quoting 19 U.S.C. 1505; 26 U.S.C. 6611(a); 28 U.S.C. 2411, 2644). These waivers apply to refunds of every tax or duty analogous to the HMT, and furthermore (the government admits) to refunds to importers of overpayments of the *HMT itself.* See BIO 11 n.4 (citing regulation under which Customs refunds HMT to importers with interest). Indeed, on the government's view, apparently only an unconstitutional export tax escapes the congressional design. Because it would be both illogical and inconsistent with the hierarchy the Supremacy Clause establishes among sources of law for Congress to withhold interest solely because it is the *Constitution* rather than some *lesser* source of law that renders an exaction illegal, the Federal Circuit and the Solicitor General would attribute to Congress pure caprice, a conclusion that is as unjust as it is implausible.

In particular, the government suspends itself on the horns of a dilemma in arguing that interest is unavailable under *either* 28 U.S.C. 2411 (providing for interest on judicial refunds of tax overpayments) *or* 19 U.S.C. 1505 (providing for interest on customs duty refunds).[1] The Federal Circuit acknowledged that Section 2411 – providing for the award of interest on "any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax" – applies on its face to the Harbor Maintenance *Tax*. Pet. App. 123a. The court of appeals erred, however, in failing to recognize that Section 2411 addresses only the terms of court orders (compare 26 U.S.C. 6611 (governing refunds by the IRS)) and thus is not one of the statutes relating to the "administration and enforcement of internal revenue taxes" (26 U.S.C. 4462(f)(2)) that Congress intended to render inapplicable to the HMT. See Pet. 19. See generally *Amicus* Br. of Elliott Turbomachinery *et al.* In any event, as petitioner now shows, the principal argument of the Solicitor General in denying interest under Section 2411 – that

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[1] Contrary to the Solicitor General's assertion (BIO 8 n.2), the petitioner in the earlier *IBM* case relied on Section 2411, *not* Section 1505, and principally relied on constitutional arguments that it had not presented below. See U.S. BIO, No. 00-482, *IBM* v. *United States* 5.

Congress intended the HMT to be treated as a *customs duty* rather than a tax (see BIO 8 (citing Pet. App. 5a)) – only supports the conclusion that interest is available under Section 1505, which mandates the "refund of duties * * * and interest" (§ 1505(b) (title)). See generally *Amicus* Br. of Customs & Int'l Trade Bar Ass'n; *Amicus* Br. of ChevronTexaco *et al.*

a. The Solicitor General echoes the Federal Circuit's view that the HMT "does not fall within any portion of the text of [19 U.S.C. 1505(c)]," which by its terms "authorizes interest only in cases in which an 'importer of record' is seeking to recover a duty or other customs charge paid in connection with the 'liquidation or reliquidation' of an entry of goods into the United States." BIO 9. But petitioner, of course, is *not* arguing that the right to interest arises from Section 1505 standing alone. Rather, Congress provided in the HMT for the "[e]xtension of provisions of law applicable to customs dut[ies]." 26 U.S.C. 4462(f) (title). Rather than enacting wholesale a new body of law the sole function of which would be to administer the HMT as it applies to exports, Congress by reference expressly subjected the HMT to existing provisions governing import duties. The Solicitor General himself concedes, in attempting to distinguish Section 2411, that "Congress expressly elected to make the Harbor Maintenance Tax subject to the enforcement provisions of the customs laws" (BIO 8), yet the government and the Federal Circuit would undo that very choice.

Congress specifically directed that "*all* administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * as if such tax were a customs duty." 26 U.S.C. 4462(f)(2) (emphasis added). The Solicitor General would simply read out of the statute the requirement that the HMT be subject to "all" of those customs laws, which plainly include Section 1505, a statute that is codified as an "[a]dministrative provision[]" of the customs laws (tit. 19, ch. 4 (title)). The government's opposition nowhere acknowledges the provision of Section 1505 that confers a right to interest, subsection (*b*), which requires the Customs Service to "refund any excess monies deposited, *together with interest thereon*, as determined on a liquidation or reliquidation."

Congress did not intend to condition exporters' right to a refund, with interest, on the formal act of "liquidation." See, *e.g.*, 19 U.S.C. 1504 (providing that, if no liquidation is performed, it is deemed to have occurred as a matter of law).

The fact that Section 1505 governs customs duties and therefore refers to imports and various acts relating to importation (see BIO 8) is immaterial. The government admits that duties are uniformly "imposed on *importers*—not on exporters—under the Harmonized Tariff Schedule of Title 19" (BIO 10 n.3) because the Constitution forbids *export* duties (Art. I, § 9, cl. 5). Customs "duties, by their very nature, provide for revenue from imports." *U.S. Shoe I*, Pet. App. 106a. Fully aware of that fact, Congress did not merely subject the HMT on *exports* to the existing "administrative and enforcement provisions of [the] customs laws" governing *imports*. Such a rule would have made Title 19 literally applicable, but functionally incomprehensible. Instead, Congress directed that those provisions, including Section 1505, be applied "*as if [the HMT] were a customs duty*" (26 U.S.C. 4462(f)(2) (emphasis added)) – *i.e.*, as if the HMT had all the characteristics of an import duty. Each phrase in Section 1505(c) on which the government relies – "importer of record," "entry," and "liquidation" – falls within Section 4462(f)(2)'s directive. The exporter of record (here, petitioner) is the obvious analogue to the "importer of record." An "entry" is the paperwork an importer submits in each instance "to secure the release of *imported* merchandise" (19 C.F.R. 141.0a(a) (emphasis added)), while a "liquidation," in turn, is "the final computation of the duties * * * accruing *on an entry*" (*id.* § 159.1) (emphasis added)). The analogue under the HMT to the "entry" and "liquidation" is the formal determination of the amount of HMT refund that Customs owes the exporter. At the very least, Section 4462(f)(2) requires the Customs Service to subject the HMT to the procedures governing import duties; this includes adopting procedures for exporters to submit an "entry" and to undergo "liquidation." The government's refusal to follow this statutory mandate cannot excuse its own failure to pay interest.

b. Nothing better illustrates that this petition presents the unfinished business of *U.S. Shoe I* than the government's failure even to *dispute* petitioner's showing that this Court previously rejected precisely the argument it now advances. See Pet. 16. Under 19 U.S.C. 1581(i), the Court of International Trade has exclusive jurisdiction over "any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * administration and enforcement" (§ 1581(i)(4)) of any statute "providing for [] revenue *from imports*" (§ 1581(i)(1) (emphasis added)). This Court held that Section 1581(i) nonetheless encompasses the application of the HMT to *exports*, relying on Section 4462(f)(*2*), which the Court described as "the *key directive*" (Pet. App. 105a (emphasis added)), and which (in language that directly parallels subsection (f)(*1*), *supra*) provides that "[f]or purposes of determining the jurisdiction of any court * * *, the tax * * * shall be treated as if such tax were a customs duty":

> True, § 1581(i) does not use the word "*exports*." But that is hardly surprising in view of the Export Clause, which confines customs duties to *imports*. Revenue from *imports* and revenue from *customs duties* are thus *synonymous in this setting*. In short, * * * Congress in § 4462(f)(2) directed that the HMT be treated as a customs duty for purposes of jurisdiction. Such *duties, by their very nature, provide for revenue from imports*, and are encompassed within § 1581(i)(1).

Pet. App. 106a (emphases added) (quotation marks and Court's brackets omitted). By parallel logic, Section 4462 subjects the HMT to the refund and interest provisions of Section 1505, notwithstanding its references to the characteristics of imports, on which the Federal Circuit and Solicitor General rely entirely. The total irreconcilability between the ruling below and this Court's unanimous decision in this very case is a further substantial ground for certiorari, and prompt reversal.

The Solicitor General furthermore flouts this Court's decision in *U.S. Shoe I* by arguing that the HMT is a reasonable "user fee" that "does not constitute *either* an internal revenue tax

or a duty, as those terms are ordinarily employed. * * * A fee for the use of government facilities is not a 'tax' or a 'duty' but is instead 'compensation' for services provided." BIO 10 n.3 (emphasis added) (quoting *U.S. Shoe I*, Pet. App. 109a). To be sure, Chief Judge Mayer made essentially that point in his opinion below denying interest when, citing his earlier solo *dissent* in *U.S. Shoe I*, he concluded that the HMT is a reasonable fee. Pet. App. 9a. But this Court unanimously disagreed with that dissenting view, and the language from *U.S. Shoe I* now quoted by the Solicitor General squarely *rejects* the very argument the government seeks to resuscitate. This Court in *U.S. Shoe I* recognized that *Pace* v. *Burgess*, 92 U.S. 372 (1876), sustained "a federal excise tax on tobacco" as "compensation given for services in fact rendered," rather than a forbidden export duty, because it "bore no proportion whatever to the quantity or value of the package" and "was not excessive" in light of those services. *U.S. Shoe I*, 523 U.S. at 369 (Court's brackets omitted). But the Court in *U.S. Shoe I rejected* the government's claim that the HMT falls within the "compensation" and "fee" rationale of *Pace*:

> Unlike the stamp charge in *Pace*, the HMT is determined entirely on an ad valorem basis. The value of the export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter. As the Federal Circuit noted, the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging. [¶] In sum, if we are "to guard against the imposition of a tax under the pretext of fixing a fee," *Pace* v. *Burgess*, 92 U.S., at 376, and resist erosion of the Court's decision in [*United States* v. *IBM*, 517 U.S. 843 (1996),] we must hold that the HMT violates the Export Clause as applied to exports.

Pet. App. 109a-110a (Court's alterations and citations omitted).

c. Nor does the Solicitor General have a coherent answer to petitioner's showing that the government's own practice

acknowledges that Section 1505 applies fully to the HMT. See Pet. 14-15. Section 1505 is the statutory authority not merely for the Customs Service to provide interest, but for it to *refund the principal*. See 19 U.S.C. 1505(b) ("The Customs Service shall * * * refund any excess monies deposited, together with interest thereon, as determined on a liquidation or reliquidation."). Indeed, the regulations providing for refunds explicitly cite Section 1505 as their statutory authority. See Pet. 14-15 & n.5. Petitioner's argument obviously is *not* that the authority of courts "to order refunds of harbor maintenance fees necessarily implies that courts also may award interest on such refunds." BIO 10. It is, rather, that Section 1505(b) "provides statutory authority for a refund, together with interest, in one breath; both stand or fall together." Pet. 14. The government's contention that Section 1505 is inapplicable, and thus that Customs is not required to refund *even the principal*, amounts to an assertion of the power to negate this Court's holding in *U.S. Shoe I* that the HMT is unconstitutional.[2]

III. Given exporters' obvious entitlement to interest under Section 1505, the Court clearly need not reach the constitutional issues raised by the second question presented. If the statutory text were less than clear, however, the mandate of the Export, Takings, and Due Process Clauses, alone or in combination, would require the government to pay interest on its refunds of the unconstitutionally exacted HMT, or at least to return to exporters the profits it actually earned. Contrary to this Court's emphatic determination in *U.S. Shoe I* that the Export Clause

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[2] The Customs Service has specifically acknowledged that Section 1505 *requires* it to pay exporters interest. See Pet. 18; Pet. App. 140a-143a. There is nothing "novel" (BIO 11 n.4) about recognizing the force of Customs' quite persuasive analysis, made (unlike the Solicitor General's brief) outside the context of litigation. Petitioner is relying not on "mere proposals" for regulations (contra *id.*), but on Customs' acknowledgement of the law's requirements. Compare *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (relying on Department of Justice's legal analysis set forth in notice of proposed rulemaking) with *Boeing Co.* v. *United States*, No. 01-1209, slip op. 15 n.13 (2003) (rejecting reliance on requirements of unadopted proposed regulations).

"*completely* den[ies] to Congress the power to tax exports *at all*" (Pet. App. 108a (emphases added)), the failure to award exporters interest on refunds of monies exacted in violation of that Clause would permit the government to gain value from export taxes and use them as a prohibited "source of revenue to the National Government" (*Fairbank* v. *United States*, 181 U.S. 283, 292-92 (1901)). The government relies on statements by this Court that the only constitutional violation requiring an award of interest is a Fifth Amendment "taking." Those statements, however, were *dicta*, and there is no persuasive textual or historical basis for denying the payment of interest for violations of the Export Clause's categorical prohibition while simultaneously mandating the award of interest as an element of the Fifth Amendment's more forgiving provision for "just compensation." Having never confronted the issue, the Court should decide it, and reject that anomalous reading of the Constitution, in this case. See generally *Amicus* Br. of Am. Ass'n of Exporters & Importers.

In addition, the Federal Circuit's decision conflicts with the principle under the Takings and Due Process Clauses that to the owners of the principal belong its fruits. See generally *Amicus* Br. of Air Prods. & Chems., Inc. (addressing Takings Clause and urging this Court to resolve related circuit conflict); *Amicus* Br. of Pearson Education *et al.* (addressing Due Process Clause). The Solicitor General misses the point of petitioner's argument – mischaracterizing the petition as claiming that the HMT was unconstitutionally "excessive" and chiding petitioner for supposedly failing to confront *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989). See BIO 14. Petitioner's argument under the Fifth Amendment is simply that "the government is required to refund the *significant profits that it actually earned* on unlawful exactions." Pet. 23 (emphasis in original). *Sperry*'s "excessiveness" inquiry does not enter into the picture, for *U.S. Shoe I* already established that (contrary to the government's argument) the HMT is not a reasonable "user fee" at all but rather an unconstitutional export tax. See *supra* at 5 n.3. It is thus the Solicitor General who fails to address the controlling precedent when he ignores the holding of *Webb's Fabulous*

Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980), that the government is required to return proceeds it earned on a distinct fund that (like the HMT exaction) lawfully belongs to a private party. Cf. *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring). The no-interest rule does not apply when the government is called on to return the "income [that] has been actually received by the Treasury and is in its possession." *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). See generally *Amicus* Br. of Federal Circuit Bar Ass'n (urging this Court to decide whether disgorgement of government's actually earned profits triggers the no-interest rule and to resolve circuit conflicts on that question).[3]

* * * * *

This case presents the Court with the opportunity to ensure fidelity both to its decision in *U.S. Shoe I* and also to the congressional design, thereby finally resolving the more than 10,000 claims under the HMT that are still pending and alleviating the serious injustice worked by the decision below. Certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

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[3] The statute in *Henkels* manifestly did *not* "provide[] for the recovery of interest along with principal." Contra BIO 16. The "net proceeds" described by the statute were nothing more than the value of the property *after its sale*. *Henkels*, 271 U.S. at 300. The Solicitor General also fails to acknowledge that *Henkels* expressly limited the earlier decision cited by the government (*United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251 (1888)) "to the precise facts of that case," concluding that "it *cannot* be accepted as a rule of general application." 271 U.S. at 302 (emphasis added). And the decision in *United States* v. *Louisiana*, 446 U.S. 253 (1980) (cited at BIO 16), had nothing to do with the return of profits earned by the government.

Respectfully submitted,

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May 5, 2003